

No. 83-331

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term 1983

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KATHY SHIRILLA, as Personal Representative  
of the Estate of Donald Andrew Taylor,  
Deceased,

Petitioners,

v.

CLAY SMALLWOOD, et al.,

Respondents.

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

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BRIEF IN OPPOSITION  
on behalf of  
RESPONDENTS SMALLWOOD, HAWKINSON,  
FINLEY, RISTE, DENTON, HENDERSON  
AND CURRY COUNTY

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COUNTERSTATEMENT OF QUESTION  
PRESENTED FOR REVIEW

Where Petitioner brought an action under 42 U.S.C. § 1983 on behalf of the deceased in which she claimed that the deceased's civil rights had been violated at the time of the deceased's alleged wrongful death more than two years earlier, did the United States Court of Appeals for the Ninth Circuit correctly affirm the ruling of the District Court that the action was time-barred under the Oregon Tort Claims Act two-year statute of limitations based on an express provision in that statute specifically covering such an action?

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STATUTES

Several of the statutes set  
forth in the Petition (Pet. Br. 7-13)  
are incorrect. The applicable statutes  
in effect at the time this action was

filed are as follows:

O.R.S. 30.265(1): "Subject to the limitations of ORS 30.260 to 30.300, every public body is liable for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function. As used in ORS 30.260 to 30.300 [the Oregon Tort Claims Act], 'tort' includes any violation of 42 U.S.C. section 1983."

O.R.S. 30.275(3): "No action [under the Oregon Tort Claims Act] shall be maintained unless such notice has been given and unless the action is commenced within two years after the date of such accident or occurrence. \* \*

\*" [While O.R.S. 30.275(3) was amended in 1981, the two-year statute of limitations is still in existence in O.R.S. 30.275(8), which became effective January 1, 1982,



and which is set forth in the Petition at pages 10-11.]

#### STATEMENT OF THE CASE

The only relevant facts are that Petitioner filed an action on behalf of the deceased in which she claimed that the deceased's civil rights were somehow violated because of the deceased's alleged wrongful death. The action was expressly brought under 42 U.S.C. § 1983, and it was filed more than two years after the deceased's death.

The District Court dismissed Plaintiff's 1983 action as time-barred under the two-year statute of limitations in the Oregon Tort Claims Act [O.R.S. 30.275(3)]. The United States Court of Appeals for the Ninth Circuit affirmed.

SUMMARY OF ARGUMENT AS TO REASONS  
WHY THIS COURT SHOULD DENY CERTIORARI

1. The decision of the United States Court of Appeals for the Ninth Circuit in this matter is in harmony with decisions of this Court on the application of state statutes of limitations to federal civil rights actions.

2. The Ninth Circuit's decision is in harmony with other courts of appeal as to the appropriateness of a two-year statute of limitations, the application of state tort claims acts, deference to legislative characterization, and the validity of state policies.

3. The Ninth Circuit's decision raises no unusual questions that call for an exercise of this Court's power of supervision.

4. The Ninth Circuit fully considered and correctly decided this matter.

## ARGUMENT

## I.

The Ninth Circuit's decision is in harmony with decisions of this Court on the application of state statutes of limitations to federal civil rights actions.

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Where, as here, a state statute of limitations by its specific terms applies to a federal civil rights action, it is applied without resort to characterization analysis. Johnson v. Railway Express Agency, 421 U.S. 454, 456 n.2, 462 (1975). Considerations of federalism leading to application of limitations provisions chosen by a state legislature are appropriate in Section 1983 actions. Board of Regents v. Tomanio, 446 U.S. 478, 492 (1980). Thus, the characterization analysis contended for by Petitioner (Pet. Br. 16-21) is not only unnecessary, it is also inappropriate.

Petitioner fails to cite this

Court's decision in Johnson v. Railway Express Agency, which applied a one-year state statute of limitations to a Section 1981 action. The state statute covered personal tort actions, including those "brought under the federal civil rights statutes." 421 U.S. at 456 n.2. In applying the one-year statute of limitations, this Court specifically rejected the argument that failure to allow a longer time (by applying a tolling rule) "would conflict seriously with the broad remedial and humane purposes" of federal law (421 U.S. at 465), and stated that there was "no conflicting federal policy to protect" (id. at 467).

This Court has expressed its approval of state policies underlying limitations on civil rights actions. Those policies include preventing stale claims, facilitating investigation, and

preventing unfair surprise. Tomanio, 446 U.S. at 487; Johnson, 421 U.S. at 464, 467 n.14. The policy behind Oregon's Tort Claims Act cannot simply be dismissed as "designed solely to protect the state treasury." (Pet. Br. 21)

In both Tomanio and Johnson, the plaintiff had pursued a federal civil rights action only after pursuing an independent remedy (Tomanio was litigated through state courts, while Johnson pursued a Title VII [42 U.S.C. §§ 2000(e) et seq.] action). The policies against staleness, competing investigation, and unfair surprise set out by this Court in those cases apply even more strongly here, where no action or proceeding of any kind was filed before Petitioner's untimely civil rights complaint.

As will be discussed below, the decision of the Ninth Circuit, which

affirmed the dismissal of Petitioner's complaint because of a specific legislative two-year statute of limitations, is in harmony with this Court's stated policies of (1) looking first to legislative characterization, (2) holding such a characterization, even for periods as short as one year, to be consistent with federal civil rights policy, and (3) affirming the policies underlying state limitations statutes.

## II.

The Ninth Circuit's decision is in harmony with other courts of appeal as to the appropriateness of a two-year statute of limitations, the application of state tort claims acts, deference to legislative characterization, and the validity of state policies.

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Petitioner erroneously contends that the Third, Fourth, and possibly Eighth Circuits are in conflict with Kosikowski v. Bourne, 659 F.2d 105 (9th

Cir. 1981), which the Ninth Circuit declined to overrule in this matter.

(Pet. Br. 18) The rule of Kosikowski is that Section 1983 actions against Oregon local government bodies and public officials are governed, due to legislative characterization, by the two-year statute of limitations contained in the Oregon Tort Claims Act. 659 F.2d at 107.

A. No circuit has held that the federal courts may indulge in their own characterization analysis where, as here, the state legislature has specifically characterized a civil rights action.

The Ninth Circuit in Kosikowski found that it was bound by legislative characterization and need not indulge in its own characterization analysis, at least where the state statute of limitations was not inconsistent with federal law. 659 F.2d at 107, 108 n.3. The cases cited by Petitioner (Pet. Br. 18-21) do

not hold otherwise, but agree that legislative characterization shall be applied unless inconsistent with federal policy, rather than being abandoned in favor of judicial characterization.

Knoll v. Springfield Tp. School Dist., 699 F.2d 137 (3d Cir. 1983), petition for cert. filed, 51 U.S.L.W. 3859 (U.S. May 20, 1983) (No. 82-1889), involved a judicial choice between "two residuary provisions of the limitations scheme" where that scheme "fail[ed] to reveal any provision expressly applicable." 699 F.2d at 141. The Court in Knoll was not faced with a specific legislative characterization of Section 1983 actions and based its holding on incompatibility of a six-month statute of limitations with federal policies. 699 F.2d at 142. Because the Court in Knoll did not set aside an express legislative character-



ization, and the decision in that case is based on federal policy rather than judicial characterization, it does not address the Kosikowski rule that federal courts need not characterize when a state legislature has already done so.

In Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978), a state statute specifically providing for a one-year limitation on Section 1983 actions alone, passed in reaction to an earlier decision of the Fourth Circuit and repealed after four years, was not applied because it specifically discriminated against the federal cause of action. 582 F.2d at 1318, 1319. The Court found that there was "no rational basis for distinguishing between § 1983 actions and actions for injury to the person" and that there was no "fair grouping and valuation of § 1983 actions

within the Virginia scheme of limitation . . . ." 582 P.2d at 1319. Here again, the state limitations period was set aside, not because of judicial characterization, but because of a federal policy -- that against hostility to federal claims. Such a policy cannot defeat the legislative characterization which controlled in Kosikowski and in this matter, where all state and federal torts by public bodies and officials are treated equally. In the other Fourth Circuit case cited by Petitioner, Almond v. Kent, 459 P.2d 200 (4th Cir. 1972), the Court was not faced with "a statute of limitations which is specifically made applicable to Section 1983 suits," and "therefore" had to "grapple with the Virginia general statute of limitations." 459 P.2d at 203.

Petitioner suggests that the Eighth Circuit may be in conflict with

Kosikowski, citing Garmon v. Foust, 668 F.2d 400 (8th Cir.), cert. denied, 456 U.S. 998 (1982), and Rosales v. Lewis, 454 F. Supp. 956 (S.D. Iowa 1978).

(Pet. Br. 18 n.1) However, the Court in Garmon found that "Iowa has no specific statute of limitations for Section 1983 actions" and that the Iowa Tort Claims Act was not raised. 668 F.2d at 405 & n.9. In Rosales, the court held that there was no specific state statute that applied (454 F. Supp. at 959), but that "[w]hen a state statute of limitations exists which clearly governs and is directly related to the federal civil rights claims, the Court need not search for a limitations period which would apply only in a remotely analogous manner " (id. at 958).

Thus, the cases cited by Petitioner simply reemphasize the rule

of Kosikowski -- where there is no expressly-labeled state limitations statute, a court must characterize the action by analogy and then compare federal policy; but where there is such an express statute, as here, it must be applied by the court unless policy dictates otherwise.

B. No circuit has held that a two-year limitations period violates the policies underlying federal civil rights law.

While there may be a split among the circuits on the appropriateness of a six-month limitations period (Knoll, 699 F.2d at 146 n.1 [statement of Adams, J., on denial of rehearing]), there is no disagreement that a two-year limitations period is sufficient time for a plaintiff to file a civil rights action. In Aitchison v. Raffiani, 708 F.2d 96 (3d Cir. 1983), a two-year statute was found

"surely adequate to permit a suit to be brought." 708 F.2d at 103. The Court in Aitchison distinguished its earlier decision in Knoll as being based on the inadequacy of a six-month period.<sup>1/</sup> Id. It is noteworthy that the Court in Aitchison specifically approved the state policy of having a shorter limitations period for public defendants, citing the Ninth Circuit's decision in Kosikowski. Id.

The Fourth Circuit, in rejecting a hostile one-year limitations period, returned to the two-year limitations period which had been applied in Almond v. Kent. Johnson v. Davis, 582 F.2d at

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<sup>1/</sup>

It should be noted that the Court in Aitchison, in the absence of an express statutory provision, applied characterization to reject a six-year statute of limitations. In this matter, by contrast, the Ninth Circuit applied an express statutory provision and rejected Petitioner's argument that a three-year limitations period applied instead.

1318. That Court also upheld the policy of promoting the prompt enforcement of claims. Id. at 1319.

The Eighth Circuit's choice of a five-year rather than a two-year statute of limitations in Garmon was based on rejection of a characterization analogy, not on a finding that a two-year limitations period would violate federal policy. 668 F.2d at 406. In the other case from the Eighth Circuit cited by Petitioner -- Rosales v. Lewis -- a two-year statute of limitations was approved. 454 F. Supp. at 960.

Therefore, there is no conflict between the cases cited by Petitioner and the two-year statute of limitations approved by the Ninth Circuit in Kosikowski and again in this matter.

C. No circuit has rejected a limitations period embodied in a state tort claims act.

Petitioner claims that the Third Circuit is in conflict with Kosikowski. (Pet. Br. 18-21) The Court in Aitchison, however, applied a state tort claims act's two-year statute of limitations to a Section 1983 action even though that act did not specifically include civil rights actions. 708 F.2d at 101, 103. The Fourth Circuit case cited by Petitioner -- Johnson v. Davis -- involved a specific hostile statute, not a state tort claims act. 582 F.2d at 1318. As noted above, the state tort claims act was not even raised in Garmon. 668 F.2d at 405 n.9.

### III.

The Ninth Circuit's decision raises no unusual questions that call for an exercise of this Court's power of supervision.

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Contrary to Petitioner's con-

tention (Pet. Br. 21-26), the Ninth Circuit's decision in this matter is not so unusual or important as to invoke this Court's special scrutiny. The two-year statute of limitations applied in this matter is much more lenient than the one-year limit approved by this Court in Johnson v. Railway Express Agency. It is a far cry from the six-month limitations period struck down in Knoll.

There is here no question of discrimination against federal causes of action, a question which this Court reserved in Johnson. 421 U.S. at 462 n.7. As noted above in the discussion of Petitioner's misplaced reliance on Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978), the Oregon statute (Tort Claims Act) contains a "fair grouping" of federal and state causes of action, applying a two-year statute of limitations



equally to Section 1983 actions, wrongful death actions, and other tort actions against all public bodies and officers whether federal or state. O.R.S. 30.265(1), 30.275(3).<sup>2/</sup>

Petitioner erroneously contends that the state choice of a two-year limitations period amounts to an impermissible grant of sovereign immunity against all actions commenced after two years. (Pet. Br. 23) If this were true, then all statutes of limitations would constitute grants of sovereign immunity, not just those which limit the liability of public bodies and officials.

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Indeed, the legislative history of the Oregon Tort Claims Act suggests that fair grouping or consistency was a goal in including Section 1983 actions within the purview of the statute. Minutes of the Oregon House Judiciary Committee, May 24, 1977.

Such a sweeping approach finds no support in the law. Taken at face value, Petitioner's reasoning would require that Section 1983 actions be available in perpetuity and that Johnson v. Railway Express Agency be overruled. Such a rule was rejected in Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980), and in Robertson v. Wegmann, 436 U.S. 584, 592 (1978).

The applicable two-year statute of limitations in the Oregon Tort Claims Act implements the approved state policies discussed above and does not significantly affect "the principal policies embodied in § 1983 . . . since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within [the limitations period]." Tomanio, 446 U.S. at 488.

Finally, Petitioner erroneously

contends that Loiseau v. Dept. of Human Resources of State of Or., 558 F. Supp. 521 (D. Or. 1983), is an example of confusion imposed upon district courts by Kosikowski. (Pet. Br. 24) The Court in Loiseau followed the Kosikowski rule for Section 1983 actions. 558 F. Supp. at 523. Also, Loiseau involved a Section 1981 action, which the Court in that case and the Court in Kosikowski specifically noted has not been characterized by the Oregon legislature. 659 F.2d at 108 (on rehearing); 558 F. Supp. at 526. Properly turning to judicial characterization in the absence of legislative characterization, the Court in Loiseau applied the Oregon Tort Claims Act's limitations period by analogy. 558 F. Supp. at 527. Moreover, even if there were some confusion as to the application of Kosikowski to Section 1981 actions, such confusion is simply irrelevant in a Section 1983 action such

as this matter.

IV.

The Ninth Circuit fully considered and correctly decided this matter.

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This matter was fully briefed and fully considered by the Ninth Circuit. Petitioner's arguments below, based on alleged violations of federal civil rights policy and constitutional law, were rejected. The case was correctly decided. Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Kosikowski v. Bourne, 659 F.2d 105 (9th Cir. 1981); Aitchison v. Raffiani, 708 F.2d 96 (3d Cir. 1983).

CONCLUSION

For the above reasons, the  
Petition for Writ of Certiorari should  
be denied.

DATED: October 28, 1983.

Respectfully submitted,

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